Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–696 OF 2009
SURIYADI, JEFFREY TAN AND ALIZATUL KHAIR JJCA
25 APRIL 2011

Contract — Agreement — Subcontract works — Failure to execute — Construction of clause — Whether a variation clause — Whether could be invoked to omit entire subcontract works — Whether omission of entire subcontract works had effect of termination of subcontract

Contract — Agreement — Construction of — Subcontract works — Words clear and unambiguous — Court must give effect to plain meaning of words — A clause must not be read in isolation but must be considered in the context of whole document

The appellant appointed the respondent as its subcontractor to execute certain building, mechanical and electrical works for a project ('subcontract works'). However, the respondent could not execute the subcontract works, by reason that required piling works remained unfinished. The appellant invoked cl 19 of Appendix A to the letter of award, requiring the respondent to suspend all works on site until any further instructions or notice. In response, the respondent submitted a claim for work already done and for alleged losses. Subsequently, the respondent filed a suit against the appellant. In relation to the preliminary question, which was answered against the appellant, the court below held that cl 19 only permitted variation of the subcontract works but not termination of the subcontract without reason or justification. Before this court, the appellant argued, inter alia, that the interpretation by the court below that cl 19 was confined to the omission of only part of the subcontracted works, was inconsistent with the clear words of cl 19. Hence, the issue before this court revolved on the interpretation of cl 19 was whether the said clause permitted the appellant to omit the entire subcontract works from performance by the respondent.

Held, dismissing the appeal with costs:

(1) To arrive at the interpretation of a document, a clause must not be read in isolation, but must be considered in the context of the whole of the document (*Chamber Colliery Ltd v Twyerould* [1915] 1 Ch 268). Thus, cl 19 should not be considered in isolation, but must be considered in the context of Appendix A as a whole (see paras 8 & 12).

(2) Appendix A provided for the termination of the subcontract, where subcontract works had been delayed and/or if the respondent were in default. But termination of the subcontract had to be for the reasons as expressly stipulated in cll 11.6 and 12. Clause 19 was the agreed provision on the right of the appellant to reduce the scope of the subcontract and not on any determination of the subcontract (see para 14).

(3) Clause 19 could not be read *ad litteram*. The omission of the entire subcontract works had the effect of termination of the subcontract. Further, the omission of the entire subcontract works was against the rationale of cl 19, which was to allow for the omission of works and adjustments of the amount of the subcontract when so necessitated by any variation of the main works by the employer. In construction contracts, variations under a contract as opposed to variations of that contract itself are commonplace. In the instant case, what the appellant had done by omitting the entire subcontract works was to take away the performance of the entire subcontract works by the respondent (see paras 17 & 20).

(4) 'Omission' under cl 19 was not made out, that cl 19 was a variation clause and so could not be invoked to omit the entire subcontract works, as the wholesale omission of the subcontract works which would leave nothing to the respondent for performance was as good as termination of the subcontract, and that termination of the subcontract could only be justified under cll 11.6 and/or 12 (see para 21).

[Bahasa Malaysia summary

Perayu melantik responden sebagai subkontraktor untuk membangunkan bangunan, kerja-kerja mekanikal dan elektrik tertentu untuk sebuah projek ('kerja-kerja subkontrak'). Walau bagaimanapun, responden tidak dapat melaksanakan kerja-kerja subkontrak, atas sebab bahawa kerja-kerja cerucuk yang masih belum selesai. Perayu membangkitkan klausa 19 lampiran A surat award, yang memerlukan responden untuk menggantung semua kerja-kerja di tapak sehingga apa-apa arahan atau notis selanjutnya. Sebagai balasan, responden mengemukakan tuntutan untuk kerja yang telah siap dan bagi kerugian yang didakwa. Responden kemudiannya memfailkan saman terhadap perayu. Berhubung dengan soalan awalan, yang telah dijawab terhadap perayu, Mahkamah Tinggi memutuskan bahawa klausa 19 hanya membenarkan variasi kerja-kerja subkontrak tetapi tidak penamatan subkontrak tanpa sebab atau justifikasi. Di hadapan mahkamah ini, perayu berhujah, antara lain, bahawa tafsiran oleh Mahkamah Tinggi bahawa klausa 19 terhad kepada peninggalan hanya sebahagian daripada kerja-kerja subkontraktor, adalah tidak selaras dengan perkataan klausa 19 yang jelas. Oleh itu, isu sebelum mahkamah ini berkisar pada tafsiran klausa 19 adalah

sama ada klausa tersebut membenarkan perayu untuk meninggalkan kerja-kerja subkontrak keseluruhan daripada pelaksanaan responden. A

Diputuskan, menolak rayuan dengan kos:

(1) Untuk menyampaikan tafsiran dokumen, fasal tidak perlu dibaca secara berasingan, tetapi perlu dipertimbangkan dalam konteks keseluruhan dokumen tersebut (*Chamber Colliery Ltd v Twyerould* [1915] 1 Ch 268). Oleh itu, klausa 19 tidak perlu dipertimbangkan secara berasingan, tetapi perlu dipertimbangkan dalam konteks lampiran A secara keseluruhan (lihat perenggan 8 & 12). B C

(2) Lampiran A yang memperuntukkan penamatan subkontrak, yang mana kerja-kerja subkontrak telah ditangguhkan dan/atau jika responden berada dalam lalai. Namun begitu, penamatan subkontrak mestilah atas sebab-sebab seperti yang jelas dinyatakan dalam klausa 11.6 dan 12. Klausa 19 adalah peruntukan yang dipersetujui sebagai hak perayu untuk mengurangkan skop subkontrak dan tidak pada apa-apa penentuan subkontrak (lihat perenggan 14). D

(3) Klausa 19 tidak boleh dibaca secara *ad litteram*. Peninggalan keseluruhan kerja-kerja subkontrak mempunyai kesan penamatan pada subkontrak. Selanjutnya, peninggalan kerja-kerja subkontrak keseluruhan adalah bertentangan dengan rasional klausa 19, iaitu untuk membolehkan peninggalan kerja-kerja dan pelarasan jumlah subkontrak apabila diperlukan oleh variasi sebarang kerja-kerja utama oleh majikan. Dalam kontrak pembinaan, variasi di bawah kontrak berbeza dengan variasi kontrak itu sendiri perkara biasa. Dalam kes ini, apa yang telah perayu lakukan dengan meninggalkan keseluruhan kerja-kerja subkontrak adalah untuk merampas pelaksanaan keseluruhan kerja-kerja subkontrak oleh responden (lihat perenggan 17 & 20). E F G

(4) 'Omission' di bawah klausa 19 tidak dibuat, untuk bermaksud bahawa klausa 19 adalah satu klausa variasi dan oleh itu, tidak boleh dibangkitkan untuk meninggalkan keseluruhan kerja-kerja subkontrak, kerana peninggalan kerja-kerja subkontrak secara besar-besaran, yang tidak akan meninggalkan apa-apa kepada responden untuk pelaksanaan adalah seperti seperti penamatan subkontrak, dan bahawa penamatan subkontrak hanya boleh dibenarkan di bawah klausa 11.6 dan/atau 12 (lihat perenggan 21).] H I

Notes

For a case on construction of agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2815.

Cases referred to

Carr v JA Berriman Ptv Ltd (1953) 27 ALJR 273 (refd)
Chamber Colliery Ltd v Twyerould [1915] 1 Ch 268 (refd)
Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor [1995] 1 MLJ 513, FC (refd)
Commissioner for Main Roads v Reed & Stuart Pty Ltd & Anor (1974) 48 ALJR 461 (refd)
Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd [1997] 1 MLJ 587; [1997] 1 CLJ 23, CA (refd)
Honeywell Control Systems Ltd v Multiplex Constructions (UK) Ltd [2007] EWHC 390 (TCC) (refd)
Jodrell Re (1890) 44 Ch D 590 (refd)
Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd [1990] 2 MLJ 163, HC (refd)
Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131; [2006] 2 CLJ 337 (refd)
Tan Hock Chan v Kho Teck Seng [1980] 1 MLJ 308 (refd)
Tetuan Kumar Jaspal Ouah & Aishah v Far Legion Sdn Bhd [2007] 3 MLJ 305, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 33 r 2

L Foo (Hairul Azam with him) (Azam Lim & Pang) for the appellant.
Lim Seng Chai (SC Lim & Partners) for the respondent.

Jeffrey Tan JCA (delivering judgment of the court):

[1] Pursuant to O 33 r 2 of the Rules of the High Court 1980 which provides that 'The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated', the defendant (appellant in this appeal) applied to the court below for the following preliminary question to be tried:

> Adakah Klausa 19.0 Appendix A - Supplementary Terms and Conditions memberi kuasa ataupun hak kepada Defendan untuk mengeluarkan segala skop kerja Plaintif di bawah kontrak Kecil.

[2] The pertinent background facts, as found by the court below and against which there is no dispute, could be summarised as follows. By letter of award dated 12 March 2004 (see p 52 of the appeal record), the appellant appointed the respondent as its subcontractor to execute certain building, mechanical and

electrical works for a project known as 'Cadangan Pembangunan Perumahan Angkatan Tentera di atas Tanah Milik Kerajaan di atas Lot PT 2082 Mukim Ampang, Kuala Lumpur' ('the subcontract works'). However, the respondent could not execute the subcontract works, by reason that required piling works remained unfinished. Thereafter, the appellant invoked cl 19 of Appendix A to the letter of award, which read as follows:

> We reserve the right to omit wholly or in part of the works from the subcontract. The omissions of works prescribed may be deducted from the subcontract sum. No claim whatsoever will be entertained for such omissions.

[3] In its letter dated 2 December 2004 (see 146AR), the appellant notified the respondent as follows:

> … we hereby invoke clause 19.0 of Appendix A — Supplementary terms and Conditions and hereby give you notice that you are omitting wholly the works awarded to your goodselves under the above subcontract.
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> In view thereof, kindly suspend all works on site until any further instructions or notice from us. In meantime, kindly submit your claims for works carried out to date on or before 7th December 2004.

[4] In response, on 9 December 2004, the respondent submitted (see 148AR) a claim for work already done and for alleged losses (alleged loss of profits not included). In September 2005, the respondent filed suit against the appellant. In relation to the preliminary question, which was answered against the appellant, the court below held that cl 19 only permitted variation of the subcontract works but not termination of the subcontract without reason or justification (see p 13 of the *rekod rayuan tambahan*).

[5] Before us, it was argued by learned counsel for the appellant that the preliminary question was so framed that it had to do with the omission of works but not termination of the subcontract, that cl 19 concerned the omission of works, that cl 19 clearly provided that the appellant could 'omit wholly or in part of the works', that the omission of works, be it wholly or in part, did not result in termination of the subcontract, and that the court below erred when it approached cl 19, as it did, as a termination clause.

[6] Learned counsel for the appellant further contended that whilst 'termination brings a contractual relationship to an end', the instant omission of works was pursuant to a contractual provision, that cl 19 did not stipulate that the appellant must give reasons for the omission of works, that since the respondent was not obliged to execute omitted works there could be no issue of the appellant preventing performance of the subcontract by the respondent, that since there could be no issue of the appellant preventing performance of

A the subcontract by the respondent, the court below erred when it held, as it did, that cl 19 could not be interpreted to mean that the appellant could prevent performance of the subcontract by the respondent, and that the interpretation by the court below that cl 19 was confined to the omission of only part of the subcontracted works, was inconsistent with the clear words of cl 19.

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[7] One authority cited by learned counsel for the appellant was *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 2 CLJ 337, where Abdul Kadir Sulaiman JCA, as he then was, held 'It is axiomatic that it is the duty of the court to give effect to the clear intention of
C the parties as expressed …'.

[8] We entirely agree that courts must give effect to the plain meaning of words, where words are clear and unambiguous. 'It boils down to this. Where a contract is couched in unambiguous language, the court must give effect to it
D …' (*Datuk Yap Pak Leong v Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587; [1997] 1 CLJ 23 at p 53, per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court). But to arrive at the interpretation of a document, a clause must not be read in isolation, but must be considered in the context of the whole of the document (*Chamber Colliery Ltd v Twyerould* [1915] 1 Ch
E 268). The same has been said over and over again, over time. The following three authorities bear that out.

[9] In *Re Jodrell* (1890) 44 Ch D590, Lord Halsbury said:

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> I do not know what the testator meant except by the words he has used … For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document and not to part of it; and having looked at the whole of the document to see, if I can, through the document what was in the mind of the testator. Those are general principles for the construction of
G all instruments and to that extent it may be said that they are canons of construction.

[10] In *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163, Lim Beng Choon J held:

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> In considering the dispute of the parties, I must first of all bear in mind the general principles of construction of contract as enunciated in *National Coal Board v Neill (William) & Son Ltd* [1984] 1 All ER 555 where it is said at p 560:

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> > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contact. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have

> regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.

In *Central Bank of India v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Neill & Son Ltd* [1984] 1 All ER 555 case when it says at p 1290:

> Now it is common place that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[11] And, in *Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor* [1995] 1 MLJ 513, Chong Siew Fai FCJ, as he then was, delivering the judgment of the court, held:

> We were of the view that in the construction of an agreement, it would not be right to look at one clause in isolation. All the other relevant clauses in the joint venture agreement and in the trilateral agreement must also be considered in the context of the whole of the transaction. Regard must also be had to any surrounding circumstances, if any, which might legitimately be taken into consideration. In *Chamber Colliery Co Ltd v Twyerould* [1915] 1 Ch 268n at p 272, Lord Watson said:
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> > I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.
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> And, in *Barton v Fitzgerald* (1812) 15 East 530 at p 541, Lord Ellenborough CJ said:
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> > It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected ex antecedentibus et consequentibus: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done.
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> Thus, it is a matter of construction of the agreements as a whole.

[12] Clause 19 should not be considered in isolation, which was what counsel for the appellant in his submission invited us to do. Rather, cl 19 must be considered in the context of Appendix A as a whole. As was appreciated by the court below, there were other pertinent clauses in Appendix A. Clause 11.4 (see 54AR) provided that the appellant shall be permitted to take such measures necessary to minimise delay to the subcontract works. In the event that the respondent should default in complying with any instruction issued under cl 11.4, cl 11.6 (see 54AR) provided that the appellant shall be permitted 'to take over and complete the subcontract works which has been delayed, or any other portion of the subcontract works to ensure overall completion of the Main Contract works on schedule …', 'to appoint others to carry out and complete that portion of subcontract to ensure overall completion of the Main Contract on schedule …', and, to determine the subcontract …'.

[13] On termination of the subcontract, cl 12 (see 58AR) provided that the appellant shall be permitted to 'determine the subcontract … if [the Respondent] make default in one or more of the following instances', namely, 'fail to comply with the provisions in clause 7, 8 & 9', 'have abandoned the subcontract', and, 'have persistently refused or failed to comply with a written instruction by (the Appellant) to remove or remedy defective works, improper materials or goods'.

[14] Appendix A provided for the termination of the subcontract, where subcontract works had been delayed and or if the respondent were in default. But termination of the subcontract had to be for the reasons as expressly stipulated in cll 11.6 and 12. Clause 19 was the agreed provision on the right of the appellant to reduce the scope of the subcontract and not on any determination of the subcontract.

[15] Under cl 19, the appellant reserved 'the right to omit wholly or in part of the works from the subcontract'. Interpreted literally, the appellant could omit the entire works from the subcontract. But if that were so, the appellant could unilaterally withdraw from the subcontract, by omitting the entire works. On the reasonableness of such a result which would be produced if cl 19 were to be interpreted literally, the court below said:

> From the clauses mentioned above the right to terminate is given in situations or on grounds stipulated therein. If assuming for a moment that cl 19 is to be interpreted to be giving the right to the defendant to terminate the whole subcontract, then it would be a right to terminate without any reasons or justification. If that is so, cl 19 does not seem to be in accord with the trend of the other termination clauses as mentioned above, ie, the reasons/grounds are stated when termination can be exercised. This manner of interpretation, to my mind is absurd. I am in full agreement with the submission of the plaintiff that the very purpose of the subcontract is for the plaintiff to perform and complete the subcontracted works. It

> could not have been within the contemplation of parties to the subcontract that either one of them is empowered to prevent the other from performing the subcontract as it is a general principle of the law of contract that one party shall not prevent the other from performing and completing the subcontracted works … (see 12RRT).

[16] It was held by the court below that a literal interpretation of cl 19 would produce a result incongruous to the very purpose of the subcontract. And it was held by the court below, who gave a purposive interpretation to cl 19 (see *Tetuan Kumar Jaspal Ouah & Aishah v Far Legion Sdn Bhd* [2007] 3 MLJ 305, where a purposive interpretation was given to avoid a bizarre and or absurd result), that cl 19 would not allow the appellant to omit the entire works of the subcontract: 'clause 19 is in essence a variation clause where it allows the employer the right to omit part of whole of a works, but not the whole/entire contract' (see 12RRT).

[17] This much we could add. Clause 19 could not be read *ad litteram*. As correctly submitted by learned counsel for the respondent who saw it for what it was, omission of the entire subcontract works had the effect of termination of the subcontract. Also, omission of the entire subcontract works was against the rationale of cl 19, which was to allow for the omission of works and adjustments of the amount of the subcontract when so necessitated by any variation of the main works by the employer (see cl 27 at 77AR, which applied *mutatis mutandis* to the subcontract). It ought to be noted that in construction contracts, variations under a contract as opposed to variations of that contact is commonplace (see *Honeywell Control Systems Ltd v Multiplex Constructions (UK) Ltd* [2007] EWHC 390 (TCC), HT 07–33).

[18] In a building contract, the need for variations is clear because of the peculiar nature of the contract' (*Variations in the Construction Industry by Grace Xavier* [1994] 3 MLJ cxc). As advanced by *Construction Contracts Dictionary* by Chow Kok Fong at p 274, which was cited, curiously by the appellant:

> 'In construction contracts, this term (omission) is used to refer to items of work which have been removed or deleted from the original works of a construction contract. In this sense, an omission is the converse of additions. An omission can also refer to a reduction in the quantities of such work. The general effect is to reduce the contract sum.
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> … As a general principle, the power to omit is only to be exercised only in respect of bona fide omissions. Hence, a power to vary the works cannot be exercised to omit work from the contract in order that it may be awarded to another contractor merely because the latter can perform the same item of work at a lower price' (see *Simplex Floor Finishing Appliance Co v Duranceau* (1941) 4 DLR 260).

[19] That general principle was applied in *Carr v JA Berriman Ptv Ltd* (1953) 27 ALJR 273 (cited by the Federal Court in *Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308) which was followed in *Commissioner for Main Roads v Reed & Stuart Pty Ltd & Anor* (1974) 48 ALJR 461, where both Australian cases held that the omission of works clause in a construction contract could not permit the taking away of works from the contractor in the absence of bona fide omissions.

[20] In the instant case, what the appellant had done by omitting the entire subcontract works was to take away the performance of the entire subcontract works by the respondent. The appellant contended that it was omission under cl 19. To address that contention, the court below had to answer that it was either omission of works or something else. The preliminary question was whether cl 19 permitted the appellant to omit the entire subcontract works from performance by the respondent. At p 13RRT, the court below answered the preliminary question as follows: 'my finding is that clause 19 … does not give the defendant the right to terminate or wholly remove the whole subcontract works without reason or justification'. It was on account of the following selected words 'clause 19 does … not give the (Appellant) the right to terminate …' that it was contended by the appellant that the court below approached cl 19 as a termination clause. But we find no such misdirection by the court below, who, quite to the contrary, was well aware that cl 19 had to do with the right of the appellant to omit subcontract works. The contractual right of the appellant to omit subcontract works was never questioned by the court below. It was the extent of cl 19 that was in issue, and it was in the context of that question that the court below held that the omission of the entire subcontract works was not any omission as understood in cl 19 and Appendix A but something else. It was in the context of the finding that omission of the entire subcontract works amounted to termination of the subcontract that the court below appositely remarked that the appellant terminated the subcontract and so prevented performance of the subcontract works by the respondent and that the termination of the subcontract was not justified under cll 11.6 and or 12. Those were not findings that were out of line with the preliminary question.

[21] Given the facts and the law, we entirely agree with the court below that 'omission' under cl 19 was not made out, that cl 19 was a variation clause and so could not be invoked to omit the entire subcontract works, as the wholesale omission of the subcontract works which would leave nothing to the respondent for performance was as good as termination of the subcontract, and that termination of the subcontract could only be justified under cll 11.6 and or 12. That should be the reasonable interpretation of cl 19 when considered in the context of Appendix A as a whole.

[22] In the result, we unanimously dismiss this appeal with costs, and affirm the orders below.

Appeal dismissed with costs

Reported by Ashgar Ali Ali Mohamed